LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER ON REARGUMENT

TELFORD TAYLOR
Counsel for Petitioner
400 Madison Avenue
New York 17, N. Y.

CASES CITED

	PAGE
Bryant v. *Zimmerman*, 278 U. S. 63	7, 8
Dennis v. *United States*, 341 U. S. 494	4, 6
Jencks v. *United States*, 353 U. S. 657	2
Jennings v. *Lester*, 76 So. 2d 91 (La. App. 1954)	8
Konigsberg v. *State Bar*, 353 U. S. 252	9
Mitchell v. *Harmony*, 13 How. 115	4
Schware v. *Board of Bar Examiners*, 353 U. S. 232	9
Strickland v. *Prichard*, 37 Vt. 324 (1863)	8
United States v. *Auto Workers*, 353 U. S. 567	3
United States v. *Dennis*, 183 F. 2d 201	4
Yates v. *United States*, 354 U. S. 298	2, 3, 6

MISCELLANEOUS

Section 4(f) of the Internal Security Act of 1950	3, 7
Acts of Rhode Island (Jan. 1834) pp. 54-56	8
Laws of Massachusetts 1834	8
Louisiana Rev. Stat. Sec. 12, ch. 5, §§ 401-409	8
Vermont Public Acts 1833 c. 20	8
The Public Laws of Vermont (1933), ch. 347, secs. 8662-64	8
McCarthy, *The Anti-Masonic Party: A Study of Political Anti-Masonry in the United States 1827-1840*	8
The Pennsylvania Reporter and Democratic Herald (Harrisburg, Jan. 8, 1836)	9
Woodbine, *The Life of Thaddeus Stevens* (1913)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JUNIUS IRVING SCALES, *Petitioner*, v. UNITED STATES OF AMERICA.	No. 3

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER ON REARGUMENT

In its Supplemental Memorandum on Reargument, the Government has conceded (pp. 3-5) that the membership clause of the Smith Act, as written, is unconstitutional. The Government seeks to support the application of the membership clause to the petitioner by adding, either as a "constitutional standard" (p. 4) or as an "integral element of the crime" (p. 5), a limitation to "*active* membership".

Furthermore, the Government also concedes (pp. 1-2) that the judgment convicting petitioner under the membership clause must in any event be reversed. The "suggestions" (p. 3) in the Supplemental Memorandum are now advanced, it is clear, as a desperate invitation to the Court to remand the case for a new trial, instead of directing an acquittal or a dismissal of the indictment. Petitioner's reply to these "suggestions", and further comments on the issue of constitutionality, are set forth below.

1. Petitioner agrees with the conclusion in Part A of the Supplemental Memorandum (pp. 1-2) that, other issues apart, this case would have to be reversed and remanded for further proceedings, in accordance with this Court's decision in *Jencks* v. *United States,* 353 U. S. 657.

2. Other issues apart, reversal would also be required by this Court's decision in *Yates* v. *United States,* 354 U. S. 298, that the Smith Act is to be construed as punishing not mere doctrinal advocacy of force and violence, but only the advocacy of action directed to that end. In that case, the Court also held that the evidence relating to the Communist Party was quite insufficient to establish advocacy of action, and that therefore the Party could not be regarded as "the nexus between these petitioners and the conspiracy charged."

In the present case, Scales is not charged with conspiracy to advocate force and violence,[1] but only with knowing membership in a group of persons who so advocate, to wit, the Communist Party of the United States (R. 1). The evidence in this case with respect to the advocacy of the Communist Party is, as the United States declared in its Main Brief (pp. 7 and 57), essentially similar to "and in some respects identical with" the evidence in other Smith Act prosecutions, including the *Yates* case. As readily appears from the Government's own summaries of the evidence concerning the Communist Party of the United

[1]Therefore, the evidence with respect to petitioner's own utterances, or statements made by others in his presence, is irrelevant. Assuming the sufficiency of such evidence to show action-inciting advocacy, it might sustain a charge of advocacy or conspiracy to advocate. But petitioner is not so charged, nor is he charged with membership in any local group or Party faction to which action-inciting advocacy might be attributed on the basis of this evidence. Petitioner is charged only with membership in the Communist Party of the United States, and the decision here is governed by the decision, based upon a concededly similar record of evidence with respect to that Party, in the *Yates* case.

States (main Brief pp. 7-10, 56-59, and 80-94), there is nothing to support a finding that the Party, while Scales was a member, advocated action to bring about the forceful overthrow of the Government. Certainly there is nothing more than, if as much as, there was in the *Yates* case.

Accordingly, there was a failure of proof that the group, in which petitioner is charged with membership, is within the ambit of the Smith Act as interpreted in the *Yates* case. *A fortiori,* there was also a failure of proof that petitioner knew the Party to be such a group. And since there is absolutely no reason to anticipate that the evidence with respect to the Party could be "clarified to the advantage of the Government" (354 U. S. at 328) upon a new trial, the judgment should be reversed and an acquittal should be ordered on this ground, were it not for the other issues in the case.

3. The questions discussed in the two paragraphs above are not reached unless the indictment states an offense under the Constitution and laws of the United States. This is not such a case as *United States* v. *Auto Workers,* 353 U. S. 567, where the indictment was dismissed by the District Court on the basis of an erroneous interpretation of the statute, and the constitutional issues were presented to this Court without prior consideration below, and without "an adjudication on the merits" based on a record. Petitioner here has been tried and convicted, his constitutional and statutory arguments have been considered and rejected below, and the record upon which his conviction was based is before this Court. There is no possible justification for remanding this case for a new trial without first determining whether the indictment states an offense.

On the statutory issue arising under Section 4(f) of the Internal Security Act of 1950, petitioner rests on his briefs submitted prior to argument at the preceding term of

court. If the Court decides the statutory issue adversely to petitioner, the question will then be presented whether the membership clause, admittedly unconstitutional on its face, can be saved by judicial amendment.

4. It is hard to believe that the Government's contention in Part B.1 of its Supplemental Memorandum (pp. 3-5) is seriously intended. Obviously, the degree of an accused's individual "activity" in a group cannot be made an "external constitutional limitation" on the application of the Smith Act, analogous to the "clear and present danger" standard.

The "clear and present danger" doctrine is not peculiar to the Smith Act. It is a principle of limitation upon the general language of the First Amendment, and that Amendment, so limited, applies to any statute which impinges on matters to which the Amendment relates. As applied to political advocacy, the test (as rephrased by Judge Learned Hand and approved by this Court in *Dennis* v. *United States*, 341 U. S. 494, 510) requires a judicial determination of a mixed question of fact and public policy.[2]

But the degree of petitioner's "activity" as a member of the Communist Party presents only an issue of fact about his individual conduct. It is not a general principle of constitutional breadth; its determination would not require a judgment on matters of law or policy. If "activity" were to be made an issue in Smith Act proceedings, it would necessarily be one for jury determination, just

[2]See *United States* v. *Dennis*, 183 F. 2d 201, 215-16. It may be noted that, in other contexts, even questions of this broad and public type are sometimes left to juries. *Cf. Mitchell* v. *Harmony*, 13 How. 115, holding that the military seizure of private property is justified only where a jury has found that there was "immediate and impending danger" of its capture by the enemy, or "urgent necessity for the public service, such as will not admit of delay."

as is the issue whether the advocacy in which a defendant is involved is of an "action-inciting" type.

5. Accordingly, if the test of individual "activity" were to be imported into this case, it could only be as an additional element of the crime under the membership clause. But for such a construction of the clause there is not the slightest warrant, in either its language or legislative history. Of course, petitioner fully recognizes the principle that statutes should, if possible, be construed so as to favor their constitutionality. It does not follow, however, that the language of a statute can be treated as merely the pedestal of a statue. In this case, the Government seeks (main Brief pp. 39-47, Supp. Mem. pp. 3-7) to erect on the statutory pedestal an elaborate structure composed of (a) intent, (b) "activity", and (c) membership which is "tightly disciplined, quasi-military, deeply conspiratorial" and "partakes of the concert-of-action, combination, and acting-together which characterize conspiracy." This endeavor makes a mockery of all principles of legislative construction.

6. The Government's "suggestion" is not only desperate but also futile. For even if the word "active"[4] were to be read into the statutory proscription of membership, the constitutionality of the membership clause would not be saved. The five defendants whose acquittal was directed in the *Yates* case had been exceedingly "active" in the Communist Party as organizers, journalists, teachers, and public protagonists. But, as the Court observed (354 U. S. at 330), "... none of them has been engaged in or been asso-

[4]Petitioner will pass without other mention the painful and surely unconstitutional vagueness of this requirement, abundantly apparent from the proposed charge to the jury (Supp. Mem. pp. 6-7). What is a "substantial" part of a person's time?

ciated with any but what appear to have been lawful activities. . . ." It appears that the Government is simply unwilling to acknowledge the principles laid down in the *Dennis* and *Yates* cases, and persists in the theory, expressly rejected on the record in the *Yates* case, that the Communist Party is itself an unlawful conspiracy under the Smith Act, and that criminal responsibility attaches to anyone who is (354 U. S. at 329) "actively identified with the Party's affairs."

7. If the constitutionality of the membership clause were to be aided by the addition of new elements of the crime not specified in the language of the clause, this could only be accomplished by adding elements requiring proof of activity of a type which incites to action directed to the violent overthrow of government. But if such elements were to be added to the membership clause, it would then become a redundant duplicate of the other portions of the Smith Act, under which previous prosecutions have been brought.

For the Smith Act specifies the activities which Congress regarded as dangerously calculated to incite to force and violence against the government. Advocacy itself; the organization of advocating groups; the distribution of advocating literature—these activities (individual or conspiratorial), if the advocacy be of the unlawful action-inciting type, are constitutionally punishable by the Smith Act, under the decisions in the *Dennis* and *Yates* cases.

The nature of the Government's dilemma is plain enough. The membership clause is is unconstitutional as written, and efforts to salvage it by judicial amendment must fail either for inadequacy or as rendering the clause meaningless and redundant surplusage. In its main Brief (at p. 45) the government endeavored to amend the membership clause into a conspiracy clause, and fell afoul of redundancy. Now in

its Supplemental Memorandum, the Government's "suggested" amendment would, if enacted, be inadequate to satisfy the constitutional requisites.

8. The Government's "suggestion" compounds the confusion of its position on the meaning of Section 4(f) of the Internal Security Act. That Section provides that neither membership nor "the holding of any office" in the Communist Party shall constitute *per se* a violation of any criminal statute. The Government's "suggestion" thus introduces into the legislative pattern the remarkable concept of the inactive office-holder. Under the Government's theory, only "inactive" or "passive" Party officials would remain within the purview of Section 4(f). By necessary consequence of this theory, all "active" members and officers could escape the registration provisions of the Internal Security Act under the self-incrimination clause of the Fifth Amendment.

9. During the argument of this case at the last term of Court, question was raised from the bench concerning the bearing on the constitutionality issue of *Bryant* v. *Zimmerman*, 278 U. S. 63. That case involved a New York statute requiring associations, in which the taking of an oath is a condition of membership, to file reports with the Secretary of State. The statute makes it a misdemeanor to remain a member of such a society with knowledge that it has failed to file reports required by the law.

The *Bryant* case has no bearing on the present case. The statute there in question does not suppress or penalize membership in the societies to which the law applies. It is a registration measure somewhat analogous to the registration provisions of the Internal Security Act (50 U. S. C. §§ 783, 786-88), and its only sanctions are directed not at membership, but at failure to register. The principal issue

raised by the *Bryant* case was the reasonableness of the statutory classification.[5] Societies bound by secret oaths have in the past been the subject of regulatory legislation,[6] and on this basis the law was upheld. But, so far as petitioner has discovered, no federal or state statute other than the Smith Act and its comparable state predecessors has ever undertaken to suppress membership itself, and it is noteworthy that earlier efforts directed to this end failed.[7]

---

[5]The New York statute, enacted in 1923, was directed at the Ku Klux Klan. So was a statute enacted in Louisiana a year later, requiring every association (other than churches and the National Guard) to file membership lists with the Secretary of State. Louisiana Rev. Stat. Sec. 12, ch. 5, §§ 401-409; see *Jennings* v. *Lester*, 76 So. 2d 91 (La. App. 1954). It is made a misdemeanor for a member to attend a meeting of a society which has not filed its report.

[6]*Cf.* the British statute of 1817 *punishing* membership in certain oathbound societies, cited in petitioner's main Brief, p. 14. In the United States, in addition to the Klan, the Masons have been the main object of legislative scrutiny. See McCarthy, *The Anti-Masonic Party: A Study of Political Anti-Masonry in the United States 1827-1840*, in the Annual Report for 1902 of the American Historical Association, vol. I, p. 365. In 1833 and 1834 respectively, Vermont and Massachusetts passed laws prohibiting any person from taking or administering any oath other than as required or authorized by law. Vermont Public Acts 1833 c. 20; Laws of Massachusetts 1834; *cf. Strickland* v. *Prichard*, 37 Vt. 324 (1863). In 1834 Rhode Island enacted a law repealing numerous Masonic charters, and requiring all other Masonic groups to file elaborate reports of membership, requirements for admission, and property. Acts of Rhode Island (Jan. 1834) pp. 54-56. The Vermont statute apparently is still in effect. *The Public Laws of Vermont* (1933), ch. 347, secs. 8662-64. It is interesting that the Masons, among certain other groups, were expressly excluded from the scope of the New York statute of 1923.

[7]According to McCarthy, *op. cit. supra* note 6 at pp. 513-53, the anti-Masonic bills introduced in Vermont, Massachusetts, and Rhode Island were prohibitory and far more drastic than the laws as enacted. In Pennsylvania, Thaddeus Stevens in December 1835 reported a bill to the legislature entitled "An Act to Suppress Secret Societies Bound Together by Unlawful Oaths". McCarthy, *supra*, p. 473; Woodbine, *The Life of Thaddeus Stevens* (1913) pp. 22-25. In response to Stevens' inquiries to the then leading presidential aspirants, Daniel Webster approved a prohibition of secret oaths. But William Henry Harrison, while acknowledging that Masonry might be "a proper subject for the deliberation and action of some of the constituted authorities of our country", rejected the proposed pro-

10. The plain fact is that the membership clause of the Smith Act is a flagrant abridgment of freedom of speech and the right of assembly, void by every established criterion of the scope of the First Amendment. It purports to punish membership even though the accused's knowledge of the group's unlawful purposes, and his intent to effectuate them, are confined entirely to his own mind, and are never manifested in any act of advocacy prohibited by the Smith Act, or in any agreement with others to do the acts so prohibited.

This Court has recently held that past membership in the Communist Party is no basis for refusing admission to the bar, and does not support an inference of bad character. *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar*, 353 U. S. 252. Where there is no evidence of illegal activity or conspiracy (353 U. S. at 244), there is no legal ground to distinguish long past from recent or present membership. If Party membership is a sign of "woolly mind or naive notions regarding the problems of society" (353 U. S. at 250-51), still that is hardly a sufficient basis for conviction of felony under the laws of the United States.

October 1, 1957.

Respectfully submitted.

TELFORD TAYLOR
Counsel for Petitioner
400 Madison Avenue
New York 17, N. Y.

---

hibitory legislation, saying that he was "certain that there exists no such power either in the whole government of the United States, or of any of its departments, and that the attempt to exercise it would constitute a usurpation of power, pregnant, if tolerated by the people, with mischiefs infinitely more fatal than those which it was intended to remedy." McCarthy, *supra*, pp. 473-79; *The Pennsylvania Reporter and Democratic Herald* (Harrisburg, Jan. 8, 1836), p. 2 col. 2. Stevens' bill failed of enactment by the Pennsylvania legislature.